No. SC85657

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. BOBBY JOE MAYES,

Relator,

v.

THE HONORABLE JOHN D. WIGGINS,

Respondent.

On Petition for Writ of Prohibition

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Respondent

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JURISDICTIONAL STATEMENT

This case involves an original petition for writs of mandamus and prohibition filed in this Court by relator pursuant to Supreme Court Rules 94.01, et seq. and 97.01, et seq. The petition for remedial writ challenges respondent's order declaring a mistrial and ordering a new penalty phase trial after the jury in his penalty phase trial failed to reach a verdict. This Court issued a preliminary writ of prohibition on December 23, 2003, preventing respondent from doing anything other than setting aside that order and imposing sentence. Respondent filed his written return, activating the briefing schedule. As respondent's action deals with application of Missouri law governing the imposition of the death penalty, this Court presumably has jurisdiction over this writ petition. Article V, §§ 3-4, Missouri Constitution (as amended 1976, 1982); State ex rel. Baker v. Kendrick, 136 S.W.3d 491 (Mo. banc 2004).

STATEMENT OF FACTS

Relator, Bobby Joe Mayes, was convicted of two counts of first-degree murder and two counts of armed criminal action in the double homicide of his wife, Sondra Mayes, and stepdaughter, Amanda Perkins. State v. Mayes, 63 S.W.3d 615, 621 (Mo. banc 2001). The facts of the underlying offense were stated by this Court in its opinion on direct appeal as follows:

> [A]t the time of the murder on August 10, 1998, Defendant was married to Sondra, and lived with her and his 14-year-old stepdaughter, Amanda, in Houston, Missouri. Defendant was scheduled to go to trial the next day, August 11, for committing statutory sodomy on his two minor daughters from a previous relationship. He wanted Sondra and Amanda to testify for him, and they had been endorsed as defense witnesses.
>
> Evidence was presented that the couple was having financial and marital difficulties. Sondra had told Defendant that she would not testify for him unless he signed a document that purported to waive his right to contest Sondra's ability to unilaterally convey the couple's marital real property. On August 6, 1998, just four days before the murder, Defendant talked briefly with an acquaintance, Michael James, about his financial difficulties and indicated that he did not want to return home

when his wife was there because they might get into a conflict. Defendant also unsuccessfully sought Mr. James' help to buy a gun, allegedly to rob another man.

The next day, August 7, 1998, Defendant signed the waiver of marital rights that Sondra had requested in return for her promise to testify. The State presented evidence that Sondra went to work at 8 a.m. on August 10, 1998, as usual. Sondra told her co-worker and friend, Cora Wade, that even though Defendant had signed the waiver "she had not been able to work up the courage to tell him that she still wasn't going to testify for him." Although Cora and Sondra planned to talk more in the afternoon, Sondra went home during her lunch break, as she did on most days, but never returned to work. A neighbor, Charles Noakes, saw both Sondra and Bobby Mayes' cars in the driveway at 12:15 p.m. At 1:15 p.m., he heard Bobby's car, which had a distinctive sound due to a defective muffler, start up and leave.

Cora called Sondra's house at about 1:15 p.m., when she realized Sondra had not yet returned to work, but no one answered. According to Mr. Noakes, about 45 minutes later Duane Sutton, Sondra's father, came by the house and knocked on

the door. Mr. Sutton testified that he called through the window for Sondra, but no one answered.

Around 4:20 p.m., Mr. Noakes saw Defendant return home. Shortly thereafter Defendant called 911. When asked what was wrong, he said, "I don't know. I just come home and, I don't know. You just need to send somebody over here," and that someone was "hurt" and was not breathing. He refused to check for a pulse, stating, "I'm not going in there," but agreed not to touch anything and to flag down the ambulance.

Officer Campbell arrived to find Defendant pacing back and forth in the driveway and rubbing his hands with a blue shop cloth. When asked what was wrong, Defendant responded he did not know. The officer looked around the house and discovered Sondra's body in the master bedroom. When the next officer to arrive asked Defendant what was going on, he threw up his arms and shouted, "I have an alibi, I have an alibi. I've been fishing for the last three and a half hours." He was perspiring and "fidgety" and continued to wipe and scrub his hands with the blue shop cloth. When Chief of Police Kirkman arrived, Defendant said he had last seen his wife at 7:00 a.m., that he had been fishing at "Flat Rock" or "White Rock," and that he talked to her on the telephone

briefly when he returned home to make a sandwich before returning to fish at either "Flat" or "Duke." Still massaging his hands, Defendant did not ask about his wife or even mention Amanda. Chief Kirkman observed ligature marks on the back of his hands.

After investigating Sondra's murder for some time, police learned that Amanda should have been home but had not been seen. Her partially clothed body was found on the floor next to her bed, with a blue comforter draped across the front of her body and with a very pronounced ligature mark on her neck. Chief Kirkman advised Defendant of his Miranda rights and placed him under arrest. Police took him to the Texas County jail, where he consented to a search of his person and the seizure of his clothing. By early evening, Fred Martin, Defendant's attorney in his pending trial, met with him briefly. Later, a doctor found a laceration on Defendant's right hand and constriction injuries on the backs of both hands consistent with the ligature mark on Amanda's neck.

* * *

The State charged Defendant with two counts each of first-degree murder and armed criminal action. During the guilt

phase, the State presented detailed evidence as to Defendant's conduct at the scene of the murder, as to what the police had seen in the house, and as to what that evidence showed about the manner of Sondra's and Amanda's deaths. The evidence indicated that Amanda had been subdued by a blow to the head and then draped over the edge of her bed and stabbed in the back approximately 21 times. Not every stab wound was life-threatening, but seven stab wounds penetrated her chest cavity, and at least one severed pulmonary arteries and veins. Experts testified that in the 15 minutes following the stabbings, Amanda lost about half of her total blood volume. She died of exsanguination and lack of oxygen due to the aspiration of some of her gastric contents into her lungs.

Amanda was partially undressed, and her panties were pulled down around her ankles. Medical witnesses testified that sperm, consistent with Defendant's DNA, was found on the blood-stained bed sheet. Some of the sperm appeared to be on top of the blood, thereby indicating that the sperm was deposited after the stabbings. The abnormal size of her rectum was consistent with either sodomy or with a spasm caused by

strangulation. Amanda was also strangled with some type of cord, leaving a very pronounced ligature mark around her neck.

Sondra had been stabbed with a knife on her breasts and her left ear. The knife was also thrust into her back, lodged between her ribs and pulled laterally between the bones. It entered her chest cavity and punctured her left lung and blood vessels. She also had defensive-type lacerations on her hands and left forearm. Like her daughter, Sondra died from exsanguination. Her body was found on her bedroom floor. Blood was splattered about the room on the bed, the floor, the table, and her body. A bloody t-shirt lying near her body contained blood stains, which contained genetic material matching Sondra and a genetic component that did not match Defendant, Sondra or Amanda.

Evidence at the scene indicated that the perpetrator cleaned up in the bathroom after the attacks. Police found a bloody fingerprint on the bathroom sink, later positively identified as matching Defendant's left ring finger. They discovered a pair of men's gray underwear with a bloodstain in a laundry basket and seized it and other items of evidence.

The State presented the testimony of Michael James, Charles Noakes and Cora Wade, described above. The State also

> presented, among other witnesses, the testimony of David Cook, who had shared a cell with Defendant for several days. Mr. Cook testified that Defendant admitted to him that he had killed Sondra and Amanda, explained how he had done so, and told him about the family's financial, marital and legal problems. On cross-examination, Defendant impeached Mr. Cook by showing that Mr. Cook had pending second-degree burglary and felony escape charges that were reduced after he agreed to testify.
>
> Defendant presented expert testimony that no hairs foreign to the bodies of the two victims or Defendant were uncovered. Defendant also called Fred Martin, who was to represent him in his sexual assault trial. Mr. Martin testified that Sondra and Amanda were scheduled to be witnesses for the defense in that case and that, as far as he knew, as of the day of the murders they were still intending to testify on his behalf.

Id. at 621-23. This Court affirmed relator's convictions on all counts and his sentences for armed criminal action, but reversed his death sentences and remanded for a retrial of the penalty phase. Id. at 621, 640. Respondent, Judge John D. Wiggins, presided over that retrial (Resp.App. A19).

Following the presentation of evidence at that retrial, on May 20, 2003, the jury returned verdicts as to both counts finding two statutory aggravating circumstances in the

murder of Sondra Mayes and three aggravating circumstances in the murder of Amanda Perkins, but stating that the jury could not agree on a punishment on either count (Resp.App. A17-A22, A60). Respondent discharged the jury and set the case for final sentencing (Resp.App. A23, A60). Prior to that sentencing hearing, this Court handed down its opinion in State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003). Relator first filed a motion for new trial or for the entry of a life sentence, and then filed a motion asking the trial court only to sentence appellant to life without parole on the two counts, arguing that Whitfield prevented a new penalty phase, and that the "Missouri Death Penalty Scheme" had been ruled unconstitutional by Whitfield (Resp.App. A61-A99).

At a hearing held on August 1, 2003, following argument on appellant's motion, respondent overruled appellant's motion for a life sentence and ordered a new penalty phase trial (Resp.App. A57). He did this because 1) he could not consider the aggravating and mitigating circumstances and impose relator's sentence under Whitfield and therefore could not impose a sentence himself, and 2) because the reversal and resentencing to life in Whitfield was required under § 565.040.2, RSMo 2000, as Mr. Whitfield had been unconstitutionally sentenced, but relator had not been sentenced, so a life sentence was not required (Resp.App. A26-A57). On September 4, 2003, respondent entered an order setting the new penalty phase trial in February 2004 (Resp.App. A100). Relator then filed his application for a writ of mandamus and a writ of prohibition with this Court (Resp.App. A1-A99). On December 23, 2003, this Court issued a preliminary writ in prohibition and directed respondent to show cause why a writ of prohibition should not issue prohibiting him from

"doing anything other than" setting aside his order of September 4, 2003, ordering a new trial and sentencing relator to life (Resp.App. A117). Respondent filed his return, activating the briefing schedule (Resp.App. A118-A133).[1]

[1]The briefing schedule was suspended at one point, but then reactivated by this Court.

ARGUMENT

THE PRELIMINARY WRIT OF PROHIBITION PREVENTING RESPONDENT FROM DOING ANYTHING OTHER THAT SETTING ASIDE HIS ORDER OF A NEW PENALTY PHASE IN RELATOR'S CASE AND ORDERING HIM TO IMPOSE SENTENCE SHOULD BE QUASHED BECAUSE RELATOR WAS NOT ENTITLED TO A WRIT OF PROHIBITION IN THAT MISSOURI LAW REQUIRED RESPONDENT TO ORDER A NEW PENALTY PHASE TO PERMIT A JURY TO DETERMINE RELATOR'S SENTENCE; THIS COURT'S OPINIONS IN STATE v. WHITFIELD AND STATE ex rel. BAKER v. KENDRICK DO NOT REQUIRE RESPONDENT TO SENTENCE RELATOR TO LIFE IMPRISONMENT; AND WHITFIELD DID NOT RENDER THE DEATH PENALTY UNCONSTITUTIONAL.

Relator claims that he is entitled to a writ of prohibition preventing respondent from ordering a new penalty phase trial because the record failed to show that relator's jury found "all facts necessary for the imposition of death" (App.Br. 14-15). Relator alleges that prohibition is appropriate because there is no adequate remedy by appeal (App.Br. 17). Relator argues that State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), and State ex rel. Baker v. Kendrick, 136 S.W.3d 491 (Mo. banc 2004), required respondent to sentence relator to life imprisonment (App.Br. 15-16, 18-21). Relator contends that, under Whitfield, life imprisonment was also required because Whitfield rendered "the death penalty" as provided in Missouri statutes unconstitutional (App.Br. 16-17, 21-23).

A. Relator's Writ Application and the Preliminary Writ

In his application for writs of mandamus and prohibition, relator argued that, following the hung jury in his penalty phase retrial, relator had a "'clear, unequivocal, and specific right' to be sentenced to life imprisonment," as State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), required respondent to sentence relator to life without parole (Resp.App. A9). Relator alleged that Whitfield held that Missouri's death penalty statutes required life to be imposed because "*there was no statutory authority for granting a new trial when the jury hung at penalty phase*" (Resp.App. A10)(emphasis in original). To make this argument, relator relied on language in Whitfield regarding the proper remedy for a person who had been unconstitutionally sentenced to death by a judge as opposed to a jury, but concluded that the fact Mr. Whitfield had been unconstitutionally sentenced was "not determinative of the outcome" in that case (Resp.App. A10). Relator claimed an extraordinary writ was required because he had no other adequate remedy for relief and that prohibition was appropriate to avoid "unnecessary, inconvenient and expensive" litigation (Resp.App. A13).

This Court issued a preliminary writ of prohibition, ordering respondent to show cause why a permanent writ of prohibition "should not issue prohibiting you from doing anything other than setting aside your order dated September 4, 2003, ordering a new trial as to penalty phase only. . . and ordering you to impose sentence" in relator's case (Resp.App. A117).

B. Standard for Writ of Prohibition

1. Standard for Issuing Writ

"Prohibition is a discretionary writ that may be issued to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional

power." State ex rel. Doe Run Resources Corp. v. Neill, 128 S.W.3d 502, 504 (Mo. banc 2004). "[P]rohibition is an extraordinary writ and is issued sparingly." Id. "Prohibition lies only if the facts and circumstances of a particular case demonstrate unequivocally that there exists an extreme necessity for preventative action." Id.

Because the writ of prohibition is such a powerful writ, this Court has "limited the use of prohibition to three, fairly rare, categories of cases." State ex rel. Riverside Joint Venture v. Missouri Gaming Com'n, 969 S.W.2d 218, 221 (Mo. banc 1998). "First, prohibition lies where a judicial or quasi-judicial body lacks personal jurisdiction over a party or lacks jurisdiction over the subject matter the body is asked to adjudicate." Id. "Second, prohibition is appropriate where a lower tribunal lacks the power to act as contemplated." Id. "Third, prohibition will issue in those very limited situations when an 'absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court's order,' or where there is an important question of law decided erroneously that would otherwise escape review on appeal *and* the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision." Id. (citation omitted; emphasis in original); see also State ex rel. T.W. v. Ohmer, 133 S.W.3d 41, 43 (Mo. banc 2004); State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. banc 2003).

C. The Preliminary Writ Should Be Quashed as Retrial of the Penalty Phase is Required

Relator's entire argument is founded on the premise that this Court's opinions in Whitfield and the subsequent case of State ex rel. Baker v. Kendrick, 136 S.W.3d 491 (Mo.

banc 2004), require a life sentence to be imposed when the jury hangs during capital murder penalty phase deliberations (App.Br. 15-16, 18-21). However, a review of constitutional principles, of controlling Missouri statutes and the legislative intent behind them, and of the essential rationale behind Whitfield show that this is simply not true, and that a retrial is not only constitutionally permitted and legislatively preferred, but is required by the plainest and most rationale reading of Missouri statutes.

1. Retrial is Constitutionally Permissible

The United States Supreme Court has ruled that a retrial following a hung jury in the penalty phase of a capital murder trial is constitutionally permissible. Normally, the proper course of action for a criminal trial court following a hung jury is to declare a mistrial and order a new trial, as such a retrial does not implicate the Double Jeopardy clause. Sattazahn v. Pennslyvania, 537 U.S. 101, 109, 123 S.Ct. 732, 154 L.Ed.2d 558 (2003).[2] Sattazahn made clear that such a rule also applies to retrials of the penalty phase of a capital murder trial. First, the Court explained that the Double Jeopardy clause does not prohibit retrial unless there had

[2]Sattazahn was decided after Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the case on which the holdings of Whitfield rest, and discusses Ring in its analysis of this issue. Sattazahn, 537 U.S. at 111-12; see Whitfield, 107 S.W.3d at 256-264. Therefore, it is clear that a jury's failure to "make each factual finding necessary for the imposition of a death sentence" does not constitute an acquittal of the death penalty that prohibits retrial. Whitfield, 107 S.W.3d at 263.

been an "acquittal" by the jury, i.e. the entry of findings sufficient to establish legal entitlement to the life sentence. Id. at 108-109. The Court clearly held that a hung jury on the issue of punishment, even when the jury had made no findings regarding alleged aggravating factors, does not constitute a finding sufficient to establish a legal entitlement to a life sentence, and thus is not an acquittal for double jeopardy purposes. Id. at 109. Sattazahn further held that neither the Sixth Amendment jury trial guarantee nor the Due Process Clause of the Fourteenth Amendment prohibits a retrial when the jury hangs. Id. at 111-116. In light of the fact that this jury made more findings than that in Sattazahn—namely, that it found two aggravating circumstances in relator's murder of Sondra Mayes and three aggravating circumstances in his murder of Amanda Perkins—it is abundantly clear that there is no constitutional violation in conducting a retrial of relator's penalty phase (Resp.App. A17-A18).

2. Retrial is Required by Missouri Statutes

a. General Retrial Statute is Controlling

Generally, in criminal cases where the jury fails to agree on a verdict, the trial court is not only permitted to order a new trial, but is required to discharge the jury and order that the case be retried. § 546.390, RSMo 2000. The application of this section to the case at hand would make any further discussion irrelevant—because the jury was unable to reach a verdict, the trial court would be required to conduct a new penalty phase. However, § 565.001 states that it governs "the construction and procedures for . . . trial . . . of any offense defined in this chapter[.]" § 565.001.1, RSMo 2000. Statutes outside chapter 565 still apply to the provisions of the chapter unless there is a "conflict" between a chapter 565 provision and an outside

provision. § 565.001.3, RSMo 2000. This means that, if chapter 565 provides no conflicting provision, § 546.390 requires a retrial in this case.

Prior to Whitfield, there was an obvious conflict between chapter 565 and § 546.390. Section 565.030.4 provided, in relevant part:

> If the trier is a jury it shall be instructed that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

§ 565.030.4, RSMo Cum.Supp. 2003. However, in Whitfield, this Court ruled that a trial court cannot constitutionally make the findings necessary under § 565.030.4 to determine whether or not to impose a death sentence. Whitfield, 107 S.W.3d 261-62. Therefore, Whitfield holds unconstitutional that the provision of the statute permitting the court to determine the sentence when the jury fails to find the facts necessary to impose death. However, Whitfield still recognizes that a death sentence may still be imposed under § 565.030.4, even by the court following a hung jury, so long as jury makes the requisite factual findings. Whitfield, 107 S.W.3d at 256-61. Therefore, Whitfield did not invalidate the entire statute. The question is: Exactly what part of the statute is now invalid under Whitfield?

Section 1.140 provides:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 1.140, RSMo 2000. Because this Court did not rule the entirety of § 565.030.4 invalid, the determination of which part of the statute is invalid must be made in light of the legislative intent, and the statute must be interpreted to give effect to that legislative intent and uphold the statute "to the fullest extent possible." Id.; General Motors Corporation v. Director of Revenue, 981 S.W.2d 561, 568 (Mo. banc 1998); National Solid Waste Management Ass'n v. Director of Dept. of Natural Resources, 964 S.W.2d 818, 822 (Mo. banc 1998).

Applying these principles to the offending portions of § 565.030.4, it is clear that the legislative intent of the death penalty deliberation scheme was to have some finder of fact engage in the steps to determine whether to impose life or death, as it required the judge to undertake that determination if the jury was unable to agree on the punishment. § 565.030.4, Cum.Supp. RSMo 2003. Therefore, to declare that the § 565.030.4 is only invalid to the extent

that it permits the trial judge to evaluate the factual finding necessary to impose a death sentence, but that it validly allows the trial judge to undertake that deliberation so long as it only considers life, would violate § 1.140, as it would violate the legislative intent that some finder of fact consider both life and death in reaching its verdict. Further, to interpret any part of § 565.030.4 as requiring a life sentence to be imposed unless the jury finds all four of the steps of deliberation in favor of death would also violate the legislative intent, as the legislature clearly intended another finder of fact deliberate punishment if the first one could not reach a verdict.[3] Thus, the portion of the statute that permits the jury to be instructed that the court could hand down any sentence, either life or death, in the event of a hung jury, or permits the court to hand down either sentence, must be invalidated, as the legislature never intended one punishment to be considered without the consideration of the other.

With this entire portion of the statute permitting the court to sentence a capital defendant to life or death invalid under Whitfield and § 1.140, chapter 565 contains no valid provision conflicting with the general statute regarding hung juries. Under § 565.001, "other law" consistent with the provisions of the chapter would apply to capital trials. § 565.001.3, RSMo 2000. Therefore, § 546.390 required respondent to declare a mistrial and order a new penalty phase, which is exactly what he did. As such, the preliminary writ requiring respondent to set aside his new penalty phase order must be quashed.

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[3]Such an interpretation also violates the plain language of the statute. This issue is discussed in detail infra.

b. Whitfield and Baker

Relator argues that Whitfield and Baker should have compelled respondent to enter a life sentence. (App.Br. 15-16, 18-20). However, the holdings of those cases simply do not apply to this case. In Whitfield, this Court held that a life sentence was the required remedy for a Ring violation—that a judge, and not a jury, unconstitutionally made the findings of fact necessary to impose a death sentence and actually imposed that sentence. Whitfield, 107 S.W.3d 269-272. That the unconstitutional imposition of the death sentence triggered the life sentence is obvious from the Court's holding that § 565.040.2 required a life sentence when a death sentence is unconstitutionally imposed. Id. at 271-72. In this case, there was no sentence imposed—respondent simply declared a mistrial when the jury did not return the required findings of fact and ordered a new penalty phase so that relator could get exactly what he is constitutionally entitled to—findings of fact by a jury. Therefore, Whitfield does not require a life sentence be entered in this case.

In Baker, like this case, there was not an unconstitutional death sentence imposed triggering the life sentence, but the order of a new penalty phase. Baker, 136 S.W.3d at 491. However, the trial court in Baker failed to order the new penalty phase within the time permitted to do so by rule, and therefore the court lacked jurisdiction to order the new trial. Id. at 491-94. As it could not order a new penalty phase, and it could not constitutionally sentence Mr. Baker to death, the only option it had was to sentence the defendant to life. Id. at 493-94. Here, there was no jurisdictional problem, as respondent ordered the new trial within the time available to do so after the request for one was made (Resp.App. A57, A61).

Baker indicates that the trial court indeed has this option in order to comply with Whitfield's requirement that a jury make the requisite findings, as this Court noted that the trial court could have properly ruled on the motion for new trial had it done so within the thirty days between the Whitfield decision and the expiration of the 90 days to order the trial. Id. at 494. Therefore, Baker does not prevent the action respondent took in this case—ordering a new penalty phase.

Relator argues that language in Whitfield and Baker suggesting that, according to the Missouri death penalty scheme, the trial court must sentence a defendant to life when the jury cannot decide on punishment, is controlling in this case (App.Br. 15-16, 18-20) However, as explained above, this language was not essential the holding in either case. Therefore, the language was dicta, and was therefore not binding on respondent. State ex rel. Anderson v. Houstetter, 140 S.W.2d 21, 24 (Mo. banc 1940); State v. Mouse, 90 S.W.3d 145, 149 (Mo.App., S.D. 2002); Campbell v. Labor and Industrial Relations Commission, 907 S.W.2d 246, 251 (Mo. App., W.D. 1995). "Any reported opinions should be read in light of the facts of that particular case, and it would be unfair as well as improper 'to give permanent and controlling effect to casual statements outside the scope of the real inquiry.'" State on Information of Dalton v. Miles Laboratory, 282 S.W.2d 564, 573 (Mo. banc 1955). Therefore, this language was simply inapplicable to this case.

Even if this Court does not believe that the language in Whitfield and Baker regarding what happens after a hung jury post-Ring is dicta, relator's interpretation of that language

cannot aid him. Section 565.030.4, as it applied in Whitfield (and at the time of relator's first trial), read in relevant part:

> The trier shall assess and declare the punishment ***at life imprisonment*** without eligibility for probation, parole, or release except by act of the governor:
>
> (1) ***If*** the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
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> (2) ***If*** the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or
>
> (3) ***If*** the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) ***If*** the trier decides under all of the circumstances not to assess and declare the punishment at death.

§ 565.030.4, RSMo 2000 (emphasis added). At the time of the penalty phase retrial, that statute had been changed as follows:

> The trier shall assess and declare the punishment ***at life imprisonment*** without eligibility for probation, parole, or release except by act of the governor:
>
> (1) ***If*** the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or
>
> (2) ***If*** the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
>
> (3) ***If*** the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) ***If*** the trier decides under all of the circumstances not to assess and declare the punishment at death.

§ 565.030.4, RSMo Cum. Supp. 2002 (emphasis added).[4]

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[4] It is respondent's understanding that the jury in relator's case was actually instructed to find both that the defendant was not mentally retarded and that the aggravating circumstances

The primary rule of statutory construction is that the Court ascertain the intent of the legislature by considering the plain and ordinary meaning of the statute, and where the language of the statute is clear and unambiguous, there is no room for statutory construction. Jones v. Department of Revenue, 832 S.W.2d 516, 517 (Mo. banc 1992).

Here, the plain and ordinary meaning of the word "if" shows that a life sentence is not presumed *unless* all of the steps are found to favor death by the trier. Admittedly, if the trier does not find the existence of a statutory aggravating circumstance beyond a reasonable doubt, it cannot sentence the defendant to death, and must enter a life sentence. § 565.030.4(1), RSMo 2000; § 565.030.4(2), RSMo Cum.Supp. 2003. Likewise, under the old statute, if the trier does not find that the evidence in aggravation of punishment does not "warrant death," a life sentence is required. § 565.030.4(2), RSMo 2000. The approved jury instructions for these two steps reflect this interpretation. MAI-CR 3d 313.40, 313.41A, 313.48A. However, steps 3 and 4 under either the old or new statute do not require the same default in favor of life. In step 3, the trier ***may only*** sentence the defendant to life "***[i]f*** the trier concludes" that there is mitigating evidence which is sufficient to outweigh the aggravating evidence. § 565.030.4(3), RSMo 2000 (emphasis added). In step 4, the trier ***may only*** sentence the defendant to life "***[i]f*** the trier decides" under all of the circumstances not to impose death. § 565.030.4(4), RSMo 2000 (emphasis added). Therefore, under the clear and unambiguous language of § 565.030.4, RSMo 2000, the trier is ***not authorized*** to impose a life sentence

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warranted death.

unless it finds steps 3 and 4 in favor of life. Once again, the approved instructions reflect this interpretation, instructing the jury to return a verdict stating that they cannot agree on punishment if they cannot unanimously find these steps in favor of one punishment or the other. MAI-CR 3d 313.44A, 313.46A.

The trier of fact is not, under any circumstance, required to impose a sentence of death. Mayes, 63 S.W.3d at 637. However, after the trier of fact finds the existence of a statutory aggravating circumstance, thus authorizing the death penalty, and further finds that death is in fact warranted by all aggravating evidence, the trier must actually conclude that any mitigating circumstances outweigh the aggravating facts or must actually make the decision not to impose death in order to impose life. § 565.030.4(3),.4(4), RSMo 2000 and Cum.Supp. 2003. When the jury hangs, it obviously does not make these two decisions, or else it would have imposed life or death. Therefore, when the jury returns a verdict that it cannot decide punishment, it has stated that it could not agree on steps 3 and 4, and life is therefore not authorized.

Applying the plain and ordinary meaning of § 565.030.4 to a case in which there is not a Ring violation, it is clear that the court is not required to enter a life sentence when the jury is deadlocked, as the jury did not authorize that sentence by finding in favor of life in step 3 or step 4. Further, under Whitfield, the trial court itself could not make the determinations required by step 3 in favor of life, either, as it could not undertake the analysis required for the earlier finding of statutory aggravating circumstances, and thus would never reach the consideration of mitigating circumstances. Whitfield, 107 S.W.3d at 259-61. Therefore, if the jury hangs and the trial court's application of the sentencing scheme and determination of

sentence would be a violation of Ring and Whitfield, the only remaining option for the trial court is that which remains after the jury hangs in the guilt phase of any case—the declaration of mistrial and order of a new trial. § 546.390, RSMo 2000. Therefore, respondent's order in this case was not only a proper exercise of discretion and judgment, but was the only order the court could ***properly*** make under the sentencing scheme and Whitfield. Therefore, the preliminary writ of prohibition should be quashed.

c. § 565.040.1 is Not Applicable

Finally, appellant argues that the invalid language in § 565.030.4 renders "the death penalty provided in this chapter" unconstitutional, and that § 565.040.1 would therefore require a life sentence (App.Br. 16-17, 21-23). However, relator grossly misinterprets § 565.040.1. As the dissent in Whitfield properly found (and with which the majority did not disagree), § 565.040.1, only applies when "the death penalty itself is unconstitutional"—that is, the entire death penalty scheme. Whitfield, 107 S.W.3d at 273 (J. Price, concurring in part and dissenting in part). The plain language of the statute supports this interpretation, as it states "***the*** death penalty provided in this chapter," not "***any part of*** the death penalty ***scheme*** provided in this chapter." § 565.040.1, RSMo 2000. Clearly, the death penalty itself is still constitutional, and nothing in Whitfield renders it otherwise. In fact, since Whitfield, this Court has repeatedly affirmed cases in which death was imposed. State v. Edwards, 120 S.W.3d 743 (Mo. banc 2003), cert. denied 124 S.Ct. 1417 (2004); Ringo v. State, 120 S.W.2d 743 (Mo. banc 2003); State v. Gilbert, 121 S.W.3d 341 (Mo. banc 2003); Taylor v. State, 126 S.W.3d 755 (Mo. banc 2004); State v. Lyons, 129 S.W.3d 873 (Mo. banc 2004); Christeson

v. State, 131 S.W.3d 796 (Mo. banc 2004); State v. Taylor, 134 S.W.3d 21 (Mo. banc 2004); State v. Deck, 136 S.W.3d 481 (Mo. banc 2004); State v. Glass, 136 S.W.3d 496 (Mo. banc 2004); State v. Richard Strong, SC85419 (Mo. banc August 24, 2004). It seems irrational that this Court would uphold a death sentence if "the death penalty" in Missouri had been rendered unconstitutional.

Relator persists in his argument, claiming that this Court's opinion in State v. Duren, 547 S.W.2d 476 (Mo. banc 1977), permits a finding that § 565.040.1 can apply to only certain cases and not the death penalty as a whole (App.Br. 21-23). However, Duren supports the opposite conclusion. This Court held the predecessor statute of § 565.040 applied to "provide for the possibility that ***the 'penalty'*** could not be imposed for any reason[.]" Id. at 480 (emphasis added). Whitfield did not render the "penalty," i.e. the death penalty, impossible to impose, but simply restricted the manner in which it could be imposed. Because Whitfield did not render the death penalty unconstitutional, § 565.040.1 provides relator no relief.

Whitfield stands for the proposition that juries, not judges, are to decide the facts necessary to determine whether to impose life and death in a capital murder case. The plain language and legislative intent of Missouri's death penalty scheme in light of Whitfield ensures that juries, not judges, will make that decision. Respondent's order is consistent with the principle that juries are the only body entrusted to decide those facts in a capital case, as it is the only way to place that decision before a jury. Because respondent's actions are consistent with the constitutional principles, Missouri law as a whole, the death penalty statutes in particular, the legislative intent that a trier of fact find the facts necessary to determine life or

death, and Whitfield's requirement that a jury make that decision, this Court should quash the preliminary writ of prohibition.

CONCLUSION

In view of the foregoing, respondent submits that this Court should quash its preliminary writ of prohibition.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P. O. Box 899
Jefferson City, MO 65102
(573) 751-332l
Fax (573) 751-5391

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 6851 words, excluding the cover and this certification, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 8th day of October, 2004, to:

Deborah Wafer
Office of the State Public Defender
1000 St. Louis Union Station
Grand Central Building, Suite 300
St. Louis, Missouri 63103

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent